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ELISBAN A. BAZAN, APPELLANT, V. ERIC M. GONSER AND ELITE FLEET HAULING, LLC, APPELLEES.

___ N.W.3d ___

Filed August 21, 2026. No. S-25-111.

1. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
2. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
5. **Trial: Expert Witnesses: Appeal and Error.** There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
6. ____: ____: ____. An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony, and it reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
7. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.

Appeal from the District Court for Cass County: MICHAEL A. SMITH, Judge. Affirmed.

Ross R. Pesek and Daniel C. Martin, of Pesek Law, L.L.C., for appellant.

Matthew B. Reilly, Thomas J. Culhane, and Raymond E. Walden, of Erickson | Sederstrom, P.C., L.L.O., for appellees.

Funke, C.J., Cassel, Stacy, Papik, Freudenberg, Bergevin, and Vaughn, JJ.

Papik, J.

After Elisban A. Bazan was injured in a collision with a commercial vehicle, he sued the other driver and the owner of the commercial vehicle—Elite Fleet Hauling, LLC (collectively Elite Fleet). Bazan maintained that the accident caused him to experience a mild traumatic brain injury (mTBI), also known as a concussion, requiring treatment; Elite Fleet asserted that Bazan had not experienced an mTBI at all. This appeal is about the expert witnesses the parties used to support their positions. The district court did not permit Bazan's treating physician to testify as an expert regarding whether the accident caused Bazan to sustain an mTBI and regarding related aspects of Bazan's prima facie case, because Bazan had not complied with the district court's progression order. The district court did, however, allow testimony by Elite Fleet's expert, a neuropsychologist, that Bazan did not sustain an mTBI in the collision, over Bazan's claims that the witness was not qualified. Bazan now challenges these rulings on appeal. Finding no error, we affirm.

I. BACKGROUND

Bazan was driving on Interstate 80 when his vehicle was struck by one of Elite Fleet's commercial semi-trucks. Bazan sued Elite Fleet and alleged that as a result of Elite Fleet's negligence, he suffered injuries and was entitled to damages. Elite Fleet admitted that its negligent acts or omissions proximately caused the accident, but it denied the causation, nature, and extent of Bazan's alleged injuries and his damages.

During the course of the litigation, the district court made rulings on expert testimony that addressed whether the accident caused Bazan to suffer an mTBI that necessitated treatment and resulted in significant damages. After extensive pretrial discovery procedure, the district court found that Bazan had not adequately disclosed information about Dr. Demetrio Aguila's expert testimony and therefore prohibited Dr. Aguila from testifying for Bazan regarding causation, permanency, and future medical costs. Had Dr. Aguila testified on these topics, he would have opined that the accident caused Bazan to sustain an mTBI with symptoms that required regular, long-term treatment. Dr. Aguila also would have testified about the cost of that future treatment. The district court allowed Elite Fleet to present the expert trial testimony of neuropsychologist Dr. Ryan Ernst that Bazan did not incur an mTBI in the accident, over Bazan's assertions that a psychologist is not qualified to testify as to the "medical diagnoses" of an mTBI. We chronicle additional facts pertinent to the district court's rulings on expert testimony in more detail in the analysis section below.

In the end, the jury returned a verdict for Bazan in the amount of $100,000, far below the damages he sought. The district court entered judgment on the verdict and overruled Bazan's motion for new trial, which challenged the district court's expert witness rulings.

II. ASSIGNMENTS OF ERROR

Condensed and restated, Bazan assigns on appeal that the district court erred in (1) excluding the testimony of Dr. Aguila on the topics of causation, permanency, and future medical expenses and (2) allowing Dr. Ernst, a "psychologist," to render a "medical diagnosis," outside the scope of his licensure, by testifying that Bazan did not sustain a traumatic brain injury.

III. STANDARD OF REVIEW

We recite the applicable standards of review in the sections below.

IV. ANALYSIS

1. Dr. Aguila

(a) Background

(i) Pretrial Discovery Procedure

In August 2022, the trial court's first progression order scheduled trial and directed Bazan to disclose his expert witnesses by a designated date. The progression order required the disclosure to, among other things, "contain a complete statement of the opinion to be rendered and the basis therefor[]." The progression order continued, "Expert testimony will not be permitted at trial unless it is contained in the disclosure." During the ensuing months, the district court rescheduled trial and amended the deadline for expert witness disclosures, but otherwise, the relevant required content did not change.

Bazan's disclosures during the months after the initial progression order indicated he anticipated calling Dr. Aguila to "testify consistent with his [disclosed] medical records" that Bazan suffered a traumatic brain injury caused by the accident and that he needed future medical care as a result. Bazan disclosed visit notes prepared by Dr. Aguila, which documented that in 2022, he began treating Bazan for headaches that arose immediately after the 2020 accident. According to Dr. Aguila's visit notes, Bazan reported to Dr. Aguila that his vehicle was rear-ended by a semi-truck while he was wearing his seatbelt, that his airbags did not deploy, and that he lost consciousness. The visit notes also recorded Dr. Aguila's impression that an "[a]ssociated diagnos[i]s" of the traffic accident was "[c]oncussion with loss of consciousness of unspecified duration." The visit notes reflected that Dr. Aguila advised Bazan he was a candidate for a procedure to treat his headaches and that Bazan underwent multiple rounds of the procedure, after each of which Bazan experienced initial headache relief and then a subsequent return of the pain. Dr. Aguila noted that he anticipated Bazan would have the procedure repeated.

Concurrently with these disclosures, Bazan's counsel wrote a letter to Elite Fleet's counsel. The letter stated that Bazan intended to present evidence related to various injuries and symptoms, including evidence that he suffered a traumatic brain injury caused by the accident and that he needed future medical care as a result. According to the letter, Dr. Aguila would testify that "Bazan's medical treatment was caused by the crash, reasonable, necessary, and reasonably priced."

In October 2022, Elite Fleet filed a motion in limine asking the district court to exclude Dr. Aguila as a witness. Elite Fleet asserted that Bazan had fallen short of the operative progression order's requirement that expert witness disclosures shall "contain a complete statement of the opinion to be rendered and the basis therefor[]." The district court overruled Elite Fleet's motion in limine, without prejudice. But the district court cautioned Bazan that at that time, his disclosures about Dr. Aguila's testimony "[did] not comply with the requirements of . . . the Progression Order. The responses must be more explicit."

Bazan subsequently supplemented his answers to Elite Fleet's discovery requests on December 15, 2022. Bazan's counsel summarized Dr. Aguila's qualifications and the likely content of Dr. Aguila's testimony concerning causation, prognosis, and future medical costs. The supplemental answers stated that Dr. Aguila would testify consistent with his medical records, "some of which have been disclosed." Specifically, Bazan's counsel stated that Dr. Aguila would likely testify about the "broader course of [Bazan's] treatment dating back to his [emergency room] visit immediately after the crash and up to present day." Bazan's counsel stated Dr. Aguila would testify that Bazan's medical treatment was "caused by the crash, reasonable, necessary, and reasonably priced"; that the injuries incurred in the crash caused Bazan significant disruptions to his daily life; that the "injuries suffered are permanent, progressive and painful"; and that the injuries would require ongoing medical care for the rest of

Bazan's life. Bazan's counsel stated that Dr. Aguila would explain for the jury and generally endorse the findings contained in records produced by a provider to whom Dr. Aguila referred Bazan as part of a "coordinated treatment plan" for evaluation regarding "ongoing health complications felt since the subject crash." Bazan's counsel alleged that "the aforementioned medical opinions . . . will be consistent with [Bazan's] written discovery answers or future deposition or live trial testimony."

To the December 15, 2022, supplemental answers, Bazan attached some medical records. They included Dr. Aguila's visit note from November 2022 documenting Bazan's treatment for continued headaches and reiterating past impressions. They also included a concussion assessment conducted upon referral by Dr. Aguila. That assessment concluded that Bazan's symptoms were "consistent with post-concussion syndrome" following the collision and required "[s]killed concussion-based" therapy.

Also in December 2022, Elite Fleet took Dr. Aguila's deposition. Upon examination by Elite Fleet, Dr. Aguila admitted that his records did not contain an analysis regarding whether Bazan's diagnoses were caused by the collision, an analysis regarding permanency, or an opinion regarding future treatment or future costs.

At the December 2022 deposition, Dr. Aguila noted that Bazan had reported headaches to providers for years starting immediately after the collision and that Dr. Aguila had personally treated Bazan and ordered objective testing. Based on his review of all that information, plus his knowledge, training, and experience, Dr. Aguila opined that Bazan had sustained a brain injury caused by the collision.

More specifically, when asked what was significant about Bazan's medical history that led Dr. Aguila to diagnose a concussion, Dr. Aguila testified, "[T]he mechanism of injury, the fact that [Bazan] had headaches, and—you know, and his report of losing consciousness." He further testified that

records from the emergency room on the day of the crash "gave some details about the mechanism of the crash that . . . helped [him] understand better what was going on, what had happened to [Bazan] . . . [and] talk[] about him moving at a pretty high rate of speed." In a similar vein, Dr. Aguila identified his "basic understanding" of the "mechanism of injury"—that Bazan was "involved in a car crash . . . at a high rate of speed . . . on the interstate." Dr. Aguila opined that the findings documented in the emergency room on the date of the accident were "caused by the crash." Dr. Aguila referred to notes from another provider that stated Bazan was a "restrained driver" traveling at an estimated speed of 70 miles per hour when his vehicle was struck at the rear by a semi-truck traveling at an estimated 80 miles per hour, that Bazan's airbag did not deploy, and that his vehicle went off the roadway, turning about 180 degrees. Dr. Aguila testified that he agreed with previous medical records that stated that injuries suffered by Bazan were a direct result of the collision. Dr. Aguila also opined that "the most likely explanation" for evidence of a concussion shown by the objective testing he ordered "is the trauma that [Bazan] sustained," because Dr. Aguila knew that "there was major car crash . . . where he got run off the road." Dr. Aguila noted that he had not been provided with any medical records that showed a preexisting head injury.

As for Bazan's prognosis, Dr. Aguila opined at the deposition that Bazan would suffer "permanent long-term consequences because of this head injury in this crash," including an increased risk of dementia and Alzheimer's disease. He also testified headaches were a "permanent consequence[] from this car crash," agreeing that if Bazan's condition "returned to its baseline from before this crash," Dr. Aguila would "report that as a temporary aggravation," and that if Bazan was "continuing to have ongoing pain and his baseline is not the same," it would be Dr. Aguila's "opinion that it's a permanent aggravation." According to Dr. Aguila, the procedure

he had used to reduce the intensity of Bazan's headaches gave Bazan significant relief in the first round before starting to wear off, and it "seems as though [Bazan] falls into that category of patients who will likely need to have this repeated in the future."

On February 8, 2023, the district court entered a second amended progression order. Again, other than the deadlines for expert witness disclosures, the pertinent language did not change. That language stated:

> 8. Expert Witnesses. At least ninety (90) days prior to July 10, 2023, any Plaintiff who intends to call an expert as a witness in the case shall disclose the expert to all opposing parties. Any expert who [Elite Fleet] intend[s] to call to respond to the testimony of an expert witness of an opposing party must be disclosed to all opposing parties at least sixty (60) days prior to July 10, 2023. Any further rebuttal experts must be disclosed to all opposing parties at least thirty (30) days prior to July 10, 2023. The disclosures required in this paragraph shall identify the proposed expert, including, without limitation, the name, address, phone number, curriculum vitae and a listing of all publications authored by the expert which contain any discussion of concepts the expert will use in expressing his or her opinions in this case. The disclosure shall further contain a complete statement of the opinion to be rendered and the basis therefor[]. Expert testimony will not be permitted at trial unless it is contained in the disclosure.

(Emphasis omitted.)

On April 17, 2023, Bazan served Elite Fleet with supplemental responses to Elite Fleet's discovery requests. These included an affidavit by Dr. Aguila, dated April 14, 2023. That affidavit referred to records of Bazan's treatment with Dr. Aguila "as a result of" the collision, referenced attached invoices for those services, and stated that Bazan continued to receive treatment.

On May 23, 2023, Elite Fleet filed a motion to strike Dr. Aguila as a witness or to limit his opinions. Elite Fleet argued that Bazan's disclosures as to Dr. Aguila did not comply with the second amended progression order's direction to include "a complete statement of the opinion to be rendered and the basis therefor[]" by April 11. It acknowledged that Bazan had provided Dr. Aguila's treatment records, but it asserted that "Dr. Aguila's records do not contain a causation analysis, permanency analysis, future medical treatment analysis, or future medical costs."

On May 26, 2023, Bazan took Dr. Aguila's trial deposition. His testimony further explained his opinions on causation, prognosis, and the resulting need for past and future medical care.

On June 9, 2023, Bazan provided to Elite Fleet "supplemental responses to [Elite Fleet's] discovery requests and rebuttal expert witness disclosures." The document stated that all the opinions contained in Dr. Aguila's depositions "are hereby disclosed as expected trial testimony." The document also included descriptions of Dr. Aguila's potential trial testimony based on his deposition testimony. Bazan prefaced each statement about Dr. Aguila's potential testimony "[a]s rebuttal." According to the document, Dr. Aguila would testify, based on a medical article also cited in his May 2023 deposition, that "over the course of [Bazan's] crash-related treatment," his symptoms indicated that he suffered postconcussive syndrome, a "'constellation of symptoms that commonly occur after [an mTBI].'" Bazan stated that Dr. Aguila would testify that "TBI results from blunt force, nonpenetrating head trauma, trauma, concussion, assault, or sports-related injuries." Later in the document, Bazan asserted that Elite Fleet's truck "crashed into [Bazan's] vehicle at a high rate of speed and knocked it off the I-80 roadway," causing Bazan "to sustain damages to his body." Bazan asserted Dr. Aguila would testify that Bazan had undergone procedures to treat the posttraumatic headaches he suffered as a consequence of the collision and

that the collision caused Bazan to develop a long-term need for future care. The document disclosed the current cost of the procedure Bazan had undergone, stated that Dr. Aguila would testify about past and future medical costs, and referenced the previously disclosed invoices.

(ii) Motion to Strike Dr. Aguila Sustained, in Part

At a hearing on the motion to strike, the district court received exhibits related to the discovery process. Following the hearing, the district court entered an order sustaining the motion to strike in part and overruling it in part.

The district court began by observing that "the disclosure requirement at issue is pursuant to the progression orders," specifically the second amended progression order "concern[ing] experts intended to be [witnesses] in the case." The district court emphasized that the disclosure requirements of Nebraska discovery rules were "not relevant for purposes of compliance with the progression order."

The district court's order then summarized the discovery procedure as follows:

> After receiving input from counsel, a second amended progression order with new deadlines was entered on February 8, 2023. That order allowed [Bazan] until April 11, 2023 to comply with the requirements for the disclosure of experts . . . . As of the date of the hearing of this motion, [Bazan has] not provided supplements to [his] mandatory disclosures, served additional disclosures required by the Second Amended Progression Order, nor supplemented his discovery responses itemizing damages.

The district court went on to address Dr. Aguila's potential trial testimony. It cited *Gruttemeyer v. Transit Authority*, 31 F.4th 638 (8th Cir. 2022), and stated: "While a treating physician may not usually be subject to the disclosure requirements as an expert, [he or she does] become subject to those

requirements when testifying about matters outside the patient's treatment, such as causation." The district court went on:

> It is evident from Dr. Aguila's deposition and affidavit offered in support of [Bazan's] motion for summary judgment that Dr. Aguila may have testimony regarding causation, permanency, and future medical costs. This evidence is outside the scope of that allowed for a treating physician and not timely disclosed as required by the Second Amended Progression Order. Accordingly, that evidence will not be allowed.

The district court ordered Dr. Aguila's testimony on causation, permanency, and future medical costs stricken. It ordered Dr. Aguila's testimony to be limited to his treatment of Bazan.

(iii) Dr. Aguila Testifies at Trial

Dr. Aguila, a medical doctor and board-certified ear, nose, throat, and nerve specialist, testified at trial that he treated Bazan for posttraumatic headaches and neck pain following the collision. He testified that he diagnosed Bazan with an mTBI based on Bazan's report that he lost consciousness after the accident. Despite Bazan's offer of proof, which included a table of past medical expenses, the district court made rulings at trial that were consistent with its order striking Dr. Aguila's testimony on the issues of causation, permanency, and future medical costs. As a result, evidence of past medical expenses was not presented to the jury.

(b) Standard of Review

[1-3] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion. *Carrizales v. Creighton St. Joseph*, 312 Neb. 296, 979 N.W.2d 81 (2022). Similarly, appellate review of a district court's use of inherent power is for an abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if

its action is clearly against justice or conscience, reason, and evidence. *Id.*

(c) Analysis

Bazan assigns on appeal that the district court erred in excluding Dr. Aguila's testimony on the issues of causation and prognosis and related testimony concerning past and future medical expenses. To resolve this issue, we examine the district court's order partially sustaining Elite Fleet's motion to strike Dr. Aguila's testimony, which the district court later upheld at trial, and we ultimately conclude that the district court did not abuse its discretion.

Bazan mainly claims that the district court's "exclusion of expert testimony was not merely a discretionary evidentiary ruling; it was premised upon incorrect legal standards." Reply brief for appellant at 4. Bazan seems to argue that it was Nebraska's discovery and evidence rules that controlled the district court's ruling on the motion to strike and that the district court erred by not adhering to those rules. For Dr. Aguila's opinions on causation, prognosis, and future medical expenses, Bazan claims that he complied with Nebraska discovery rules addressing disclosures about expert witnesses and gave Elite Fleet ample notice of how Dr. Aguila would testify at trial. See, e.g., Neb. Ct. R. Disc. § 6-326(b)(4). He also asserts Dr. Aguila's testimony about past and future medical expenses was admissible under the Nebraska Rules of Evidence. See Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2016) (addressing facts upon which expert witness may rely for opinion to be admissible at trial).

We note that Bazan's position—that the aforementioned points of Nebraska law controlled the district court's ruling striking portions of Dr. Aguila's testimony—appears to be a response to the district court's reference to a federal case. The district court cited an Eighth Circuit case holding that if a treating physician will testify about matters outside the realm of treatment, such as causation of a condition, the treating

physician is a retained expert and the disclosure requirements of Fed. R. Civ. P. 26 are triggered. See *Gruttemeyer v. Transit Authority*, 31 F.4th 638 (8th Cir. 2022).

We acknowledge that the district court's reference to the federal case was not an aid to clarity. But we need not consider the discovery and admissibility rules put forward by Bazan, because a careful reading of the district court's order reveals that it was not on those grounds that it excluded portions of Dr. Aguila's testimony. The district court's order partially sustaining Elite Fleet's motion to strike underscored that the ruling did not implicate Nebraska discovery rules. Instead, the district court expressly based its order on whether Bazan had made disclosures in accordance with the second amended progression order's provisions regarding expert witnesses. It stated that "the disclosure requirement at issue is pursuant to" the district court's second amended progression order and that Nebraska discovery rules were "not relevant for the purposes of compliance with the [second amended] progression order." The district court's mention of the federal case does not call this express statement into question. We understand the district court to have referred to the federal case to differentiate between subjects of expert testimony—causation, permanency, and future medical costs—for which there was an inadequate disclosure and other testimony that it would permit Dr. Aguila to provide as a fact witness. And ultimately, the district court reasoned that Dr. Aguila's expert opinions on the issues of causation, permanency, and future medical costs were not timely disclosed as required by the second amended progression order. It therefore excluded them as a consequence, in accord with the progression order's warning that "[e]xpert testimony will not be permitted at trial unless it is contained in the disclosure."

[4] Bazan makes no effort to dispute that the district court had authority to enforce its second amended progression order in this manner. And indeed, such an effort would be futile. Nebraska courts, through their inherent judicial power,

have the authority to do all things necessary for the proper administration of justice. *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017). This inherent power authorizes trial courts to issue and enforce progression orders related to discovery. See, *Carrizales v. Creighton St. Joseph*, 312 Neb. 296, 979 N.W.2d 81 (2022); *Putnam, supra*. Consistent with this authority, a trial court can strike testimony when a party has not heeded a progression order. See *id.*

To the extent that Bazan highlights certain points in the discovery process to claim he was in "direct compliance" with the terms of the second amended progression order, independent of his reliance on discovery rules, we are unpersuaded. See reply brief for appellant at 9. Recall that the second amended progression order required, among other things, that disclosures "contain a complete statement of the opinion to be rendered [by the expert] and the basis therefor[]" by April 11, 2023. It also ordered that "[a]ny further rebuttal experts must be disclosed to all opposing parties at least thirty (30) days prior to July 10, 2023." As we will explain, Bazan does not show disclosures concerning Dr. Aguila that amount to "compliance" with the district court's second amended progression order. See *id*.

Bazan appears to assert that the disclosures he made on December 15, 2022, fulfilled the second amended progression order's requirements. On that date, Bazan disclosed Dr. Aguila would testify "consistent with his medical records" that "Bazan's medical treatment was caused by the crash, reasonable, necessary, and reasonably priced" and that the "injuries suffered are permanent, progressive and painful," requiring ongoing medical care. We do not view these statements as satisfying the second amended progression order because, while they may have stated Dr. Aguila's opinion in broad strokes, they did not explain "the basis therefor[]," as required by the second amended progression order: Neither the disclosures nor the referenced medical records, which the district court's ruling on the motion in limine deemed inadequate to

satisfy the language of the progression order, explained why Dr. Aguila opined that the collision was the source of Bazan's injuries requiring medical treatment or provided an analysis of Bazan's need for future treatment and its projected cost.

Bazan seems to place significance on the fact that the December 15, 2022, disclosures purported to incorporate by reference Dr. Aguila's future deposition testimony and that the December 15 disclosures put Elite Fleet "on explicit notice that Dr. Aguila's opinions, once expressed in deposition, would form part of the trial testimony." Reply brief for appellant at 6. Bazan also appears to proffer the December 2022 deposition itself as compliance with the second amended progression order. Bazan essentially asks us to equate notice to Elite Fleet in any form with adherence to the specific requirements of the second amended progression order.

We reject Bazan's attempt to shift the focus to what Elite Fleet might have known and away from the requirements of the second amended progression order. We also reject his suggestion that he could comply with the second amended progression order by bootstrapping future deposition testimony onto his December 15, 2022, disclosures. And as for the December 2022 deposition, we reject Bazan's position that it complied with the second amended progression order's expert disclosure requirements.

We are skeptical that the content of the December 2022 deposition fulfilled the second amended progression order. Upon examination by Elite Fleet, Dr. Aguila admitted that his records did not include analyses regarding causation, permanency, or future medical costs; that is, his previously disclosed records did not "contain a complete statement of the opinion to be rendered [by the expert] and the basis therefor[]" as the second amended progression order required. As for the remainder of the deposition, Dr. Aguila's testimony did little to expand on what his visit notes said about the cause of any concussion. Nor did Dr. Aguila give any meaningful opinion about permanency and future medical costs; he testified that

Bazan could be at increased risk for certain conditions later in life, but he also testified that Bazan could suffer either a temporary aggravation or a permanent aggravation in the form of headaches, for which Bazan was receiving treatment that he would "likely need to have . . . repeated."

And even if the deposition had disclosed what the second amended progression order required, we do not accept that Bazan could have used it to comply with the obligation the progression order imposed. The second amended progression order directed that Bazan "shall disclose" expert witnesses "to all opposing parties" by a designated date. It then mandated that such disclosure "shall identify" the expert by including his or her name and curriculum vitae and by "listing" relevant publications the expert had authored; the second amended progression order continued that the disclosure "shall further *contain* a compete statement of the opinion to be rendered and the basis therefor[]." (Emphasis supplied.) We read this text to communicate the district court's expectation that Bazan disclose expert witnesses directly to Elite Fleet in a discrete written format. This stands in contrast to Bazan's expectation that Elite Fleet should cobble together the necessary information by referring to Bazan's vague disclosures and medical records and Elite Fleet's own deposition of Dr. Aguila.

Bazan also calls our attention to Dr. Aguila's affidavit, which he maintains was dated and timely submitted on April 11, 2023, the second amended progression order's deadline for expert disclosures. But we need not discuss the affidavit's content because Bazan is mistaken in asserting it was timely: Dr. Aguila's affidavit was dated and notarized April 14, 2023, and disclosed to Elite Fleet on April 17. Accordingly, we do not view this affidavit as evidence that Bazan satisfied the second amended progression order's requirements.

Finally, Bazan attempts to style his June 9, 2023, disclosures about Dr. Aguila's testimony as "rebuttal disclosures." Reply brief for appellant at 8. As rebuttal expert disclosures, Bazan seems to submit, they were timely under the language

of the second amended progression order. He does not dispute that if these disclosures were not made in rebuttal, they were not timely under the second amended progression order, which required primary expert disclosures by April 11. Thus, his argument depends on whether the June 9 disclosures were in fact rebuttal disclosures. Bazan apparently suggests that they were by noting that the June 9 disclosures directly contradicted Dr. Ernst's opinion. We cannot agree that these disclosures were timely under the second amended progression order.

"Rebuttal" is a legal term of art. See *Morgan v. Commercial U. Assur. Companies*, 606 F.2d 554 (5th Cir. 1979). In Nebraska, in the context of evidence at trial, we have said that rebuttal evidence is generally confined to that which explains, disproves, or counteracts evidence introduced by the adverse party; such rebuttal evidence is not intended to give a party an opportunity to tell his story twice or to present evidence that was proper in his case in chief. See *Wright v. Forney*, 233 Neb. 258, 444 N.W.2d 895 (1989). See, also, *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996); *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977); *McClellan v. Hein*, 56 Neb. 600, 77 N.W. 120 (1898).

A body of federal authority similarly describes rebuttal as a response to the adverse party's evidence, not an alternative means to make the presenting party's prima facie case. *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999) ("[t]he principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case"); *Braun v. Lorillard*, Inc., 84 F.3d 230, 237 (7th Cir. 1996) ("plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case . . . must put in his evidence on the issue as part of his case in chief"); *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991) ("[r]ebuttal must be kept in perspective; it is not to be used as a continuation of the case-in-chief"); *Bell v. Progressive Select Ins. Co.*, 692 F. Supp. 3d 1121, 1124-25 (M.D. Fla. 2023) ("as a matter

of first principle, a rebuttal expert opinion must address new, unforeseen evidence in the other party's case or must address matters on which the opposing party bears the burden of proof, such as an affirmative defense. . . . A plaintiff's rebuttal expert may not simply raise evidence that goes to the plaintiff's prima facie case").

We find this view of rebuttal instructive in this case and conclude that Bazan's June 9, 2023, disclosures were not properly termed "rebuttal" disclosures under the second amended progression order. The disclosures explained why Dr. Aguila opined that the collision caused Bazan to sustain an mTBI and explained the observed and expected course of Bazan's postconcussive symptoms, the need for past and future treatment, and the cost of that treatment. These disclosures did not address new issues raised by Elite Fleet's disclosures or issues for which Elite Fleet bore the burden of proof; rather, they spoke directly to issues that Bazan was required to prove at trial as part of his prima facie case. Bazan cannot satisfy the requirements of the second amended progression order simply by relabeling untimely primary expert disclosures as "rebuttal." "[D]isagreeing with a defense expert on matters related to a plaintiff's case in chief does not transform a plaintiff's expert into a rebuttal expert and thereby permit a plaintiff to evade a case management and scheduling order." *Bell, supra*, 692 F. Supp. 3d at 1123. We therefore conclude that Bazan's June 9, 2023, "rebuttal" disclosures did not achieve compliance with the second amended progression order.

In sum, we find no abuse of discretion in the district court's decision to exercise its authority to enforce its second amended progression order by excluding portions of Dr. Aguila's testimony. Bazan's assertion that the district court applied the wrong legal rules is misplaced, and he has not shown that he complied with the second amended progression order's directive to provide "a complete statement of the opinion to be rendered" by Dr. Aguila "and the basis therefor[]" by the designated date, lest the testimony be excluded at trial.

The decision to exclude some of Dr. Aguila's testimony was also consistent with the district court's order overruling Elite Fleet's motion in limine months before. That order informed Bazan that his disclosures at that time were insufficient to satisfy the language of the then-operative progression order, language that the district court retained in every subsequent progression order. Despite this warning, Bazan made no meaningful and timely additions to his disclosures about Dr. Aguila to bring him into compliance with the second amended progression order. Bazan has offered us no basis to conclude that the district court's decision to exclude portions of Dr. Aguila's testimony was based on reasons that were untenable or unreasonable or that the district court clearly acted against justice or conscience, reason, and evidence. See *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017).

2. Dr. Ernst

(a) Background

Prior to trial, Bazan filed a motion to strike the testimony of Dr. Ernst. Bazan contended that as a psychologist, Dr. Ernst was not qualified to give "medical" testimony regarding "medical" criteria for diagnosing an mTBI and regarding whether Dr. Ernst agreed with Dr. Aguila, a medical doctor, that Bazan incurred an mTBI in the collision.

At a hearing on the motion to strike, the district court received an affidavit by Dr. Ernst explaining his qualifications and referring to his attached curriculum vitae. According to the curriculum vitae, Dr. Ernst had completed a doctoral degree in clinical psychology and a postdoctoral residence in clinical neuropsychology. His employment history included 8 years as a staff neuropsychologist at a rehabilitation hospital for adults with acute traumatic brain injuries. A few years before the affidavit, Dr. Ernst had given a presentation at a conference on the assessment and treatment of neuropsychological function after an mTBI.

In the affidavit, Dr. Ernst described himself as a neuropsychologist and stated that "[c]oncussion/mTBI diagnosis and treatment involves neurology and neuropsychology." According to Dr. Ernst's affidavit, neuropsychology is a "recognized area of specialization in psychology." Dr. Ernst stated that he passed the training, licensure, and qualifications common to most psychologists and that, as a neuropsychologist, he had taken numerous university-based courses in the neurosciences. In addition, consistent with his curriculum vitae, he said he was classified as a "'medical psychologist'" by the U.S. Drug Enforcement Agency and licensed in Iowa to interpret laboratory tests and brain imaging, "such as MRIs and CT scans."

Also attached to the affidavit was Dr. Ernst's report on his evaluation of Bazan, which included a consultation with Bazan and a review of his medical and psychological history, as well as accident records. At the time Dr. Ernst authored his report on Bazan, he was licensed as a psychologist in Nebraska and Iowa. Dr. Ernst stated that he performed an interview and neuropsychological testing of Bazan. Dr. Ernst opined that based upon the evidence, including medical records and accident reports, Bazan did not suffer a "concussion/mTBI."

The district court overruled Bazan's motion to strike testimony by Dr. Ernst. It observed that Ernst was a licensed psychologist with a doctoral degree in clinical psychology and a postdoctoral residence in clinical neuropsychology. Citing Nebraska statutes, the district court reasoned that Dr. Ernst's actions and opinions were within the scope of the practice of psychology as defined by Nebraska law.

At trial, Bazan renewed his motion to strike, and the district court again overruled it. Over Bazan's standing objection, Dr. Ernst opined, within a reasonable degree of medical certainty, that Bazan did not suffer a brain injury in the collision. Over Bazan's objection, Dr. Ernst testified why he disagreed with Dr. Aguila's opinion that Bazan had an mTBI.

(b) Standard of Review

[5] There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. *Yagodinski v. Sutton*, 309 Neb. 179, 959 N.W.2d 541 (2021). Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.*

[6] An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony, and it reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony. *Id.*

(c) Analysis

Bazan contends that the district court erred in allowing Dr. Ernst to opine that Bazan did not sustain an mTBI. And he submits that this alleged error was "particularly egregious" because Dr. Ernst's testimony "directly contradicted Bazan's treating physician, Dr. Aguila, a licensed medical doctor" and "improperly elevated [Dr.] Ernst's testimony over that of a licensed physician." Brief for appellant at 36.

[7] We understand Bazan to argue that Dr. Ernst's testimony was inadmissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016). That rule governs the admissibility of expert testimony and provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under rule 702, a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Whether a witness is qualified as an expert is a preliminary question for the trial court. *Id.*

In short, the premise of Bazan's position is this: The diagnosis of an mTBI is the practice of medicine, and a psychologist cannot practice medicine. Assuming for the sake of argument that an mTBI is a medical diagnosis and that Dr. Ernst's opinion was one such diagnosis, Bazan's reasoning depends on the idea that "Nebraska law draws a clear line between the practice of medicine and the practice of psychology." Brief for appellant at 31. As we are about to illustrate, these arguments do not persuade us.

In his attempt to completely isolate the practice of psychology from the practice of medicine in Nebraska, Bazan relies on our rule 702 analysis in *Yagodinski v. Sutton*, 309 Neb. 179, 959 N.W.2d 541 (2021). But Bazan misreads our reasoning in *Yagodinski*.

In *Yagodinski*, we affirmed the district court's ruling that a chiropractor was not qualified to give expert opinion testimony that his patient sustained a traumatic brain injury, on the basis that the chiropractor's diagnostic methods fell outside the scope of chiropractic practice in Nebraska as defined by the Legislature. Our analysis identified the statutory scope of practice established by the Legislature as "a factor affecting qualification" of a "licensed health professional offering [expert] testimony about a patient." *Id.* at 198, 959 N.W.2d at 554. Citing Neb. Rev. Stat. § 38-2025(13) (Cum. Supp. 2024), we recognized that a chiropractor is excluded "from the class of persons who engage in the unauthorized practice of medicine, so long as the chiropractor is 'licensed and practicing under the Chiropractic Practice Act.'" See *Yagodinski*, 309 Neb. at 192, 959 N.W.2d at 551.

We observed in *Yagodinski* that a licensed chiropractor will generally be qualified to testify as an expert on any matter that is within the scope of chiropractic practice and licensure in Nebraska; but after a detailed discussion of the statutes that defined that scope, we concluded that the chiropractor's diagnosis in that case was outside of it. In so holding, we declined to read the statutory scope of chiropractic practice

"so broadly" as to permit "licensed chiropractors to diagnose all human conditions without limitation" because such a reading "would expand the authorized diagnostic methods to be commensurate with licensed physicians and surgeons." *Id.* at 195, 959 N.W.2d at 552. See, also, Neb. Rev. Stat. § 38-2024 (Reissue 2016) and § 38-2025. We further explained that "no amount of additional education will qualify a licensed chiropractor to offer expert testimony about a patient that is outside the scope of chiropractic practice in Nebraska, absent additional licensure and credentialing" enacted by the Legislature. *Yagodinski*, 309 Neb. at 200, 959 N.W.2d at 555.

Bazan reads *Yagodinski* to hold that "[n]on-[m]edical [p]rofessionals," brief for appellant at 31, such as chiropractors and psychologists, are not qualified to diagnose "physical, medical injur[ies]" and that a traumatic brain injury is one such injury, *id*. at 32. Again, assuming for the sake of argument that an mTBI is a medical diagnosis and that Dr. Ernst's opinion qualified as a diagnosis, Bazan's position hangs on the notion that there is no overlap between the practice of medicine and the practices of other licensed health professions. However, *Yagodinski* did not hold, as Bazan submits, that chiropractors and other licensed health professionals cannot practice medicine. *Yagodinski* reasoned that as a class of licensed health professionals enumerated in § 38-2025, chiropractors cannot lawfully practice medicine to the same degree that medical doctors, physicians, and surgeons can. See § 38-2025(13). See, also, Neb. Rev. Stat. § 38-805(1) (Reissue 2016) (defining scope of chiropractic diagnosis and treatment).

Pursuant to *Yagodinski*, the key to whether Dr. Ernst was qualified to testify here is not whether he was engaged in the practice of medicine; the key instead is whether his opinion testimony falls within the statutory ambit of his licensed health profession. To be sure, to avoid the unauthorized practice of medicine in Nebraska, psychologists must be "licensed to practice in this state and practicing under and in accordance with the Psychology Interjurisdictional Compact or the Psychology

Practice Act." See § 38-2025(15). But Bazan has made no reasoned attempt to demonstrate to us that Dr. Ernst acted outside the scope of the practice of psychology as the Legislature has defined it.

Under Neb. Rev. Stat. § 38-3108(2) (Reissue 2016), the practice of psychology "includes, but is not limited to . . . the evaluation or assessment of . . . neuropsychological functioning [and] diagnosis and treatment of . . . the psychological aspects of physical illness, accident, injury, or disability." In addition, the Legislature has authorized neuropsychologists to determine whether a minor athlete can return to play after a suspected brain injury. See Neb. Rev. Stat. §§ 71-9103 and 71-9105 (Reissue 2018) (authorizing physician, certified athletic trainer, or neuropsychologist, among others, to make initial determination that minor athlete is reasonably suspected of having sustained concussion or brain injury, to evaluate minor athlete thereafter, and to give written and signed clearance to resume participation). Dr. Ernst is a doctor of clinical psychology with a specialization in neuropsychology, who was licensed as a psychologist in Nebraska as of the date of his report on Bazan. In explaining his qualifications, Dr. Ernst stated that "[c]oncussion/mTBI diagnosis and treatment involves neurology and neuropsychology." After an evaluation of Bazan, Dr. Ernst opined that he had not sustained an mTBI. Bazan has not explained how, given all these facts, Dr. Ernst acted outside the statutory scope of the practice of psychology.

In arguing that Dr. Ernst's license does not allow him to "practice medicine in Nebraska," Bazan makes a fleeting contention that Dr. Ernst is not licensed to practice neuropsychology in Nebraska, where he is "licensed only to practice psychology." Brief for appellant at 36. We are dubious that Bazan made this argument with sufficient specificity before the district court for us to address it on appeal. See *White v. White*, 320 Neb. 256, 26 N.W.3d 924 (2025) (this court will not consider argument or theory raised for first time on

appeal, because lower court cannot commit error in resolving issue never presented and submitted to it for disposition). But even if he did, Dr. Ernst explained that neuropsychology was a specialty within psychology, for which he was licensed in Nebraska at the time of his report on Bazan. Consequently, even if we understood Bazan to claim that Dr. Ernst acted outside the statutory scope of his profession, his claim lacks merit.

Provided with no convincing argument that Dr. Ernst gave an impermissible medical opinion that exceeded the statutory scope of the practice of psychology, we circle back to the language of rule 702 to decide whether the district court erred in ruling that Dr. Ernst was "qualified as an expert by knowledge, skill, experience, training, or education" to testify whether Bazan had suffered an mTBI. On this topic, we have little more to add. Dr. Ernst explained that he used his expertise as a neuropsychologist to opine whether Bazan sustained an mTBI. Bazan has not persuaded us that Dr. Ernst crossed the statutory boundaries of his profession, and he offers no other argument that Dr. Ernst was not qualified as an expert by knowledge, skill, experience, or education. Accordingly, he gives us no reason to hold that the district court abused its discretion in allowing Dr. Ernst to testify regarding whether Bazan sustained an mTBI. And insofar as Dr. Ernst's opinion contradicted the opinion of Dr. Aguila, a medical doctor and Bazan's treating physician, that presented a question of weight and credibility for the jury to decide. See *Estate of Block v. Estate of Becker*, 313 Neb. 818, 986 N.W.2d 726 (2023).

V. CONCLUSION

We are unconvinced by Bazan's arguments that the district court erred in its rulings concerning expert testimony. Consequently, we affirm.

Affirmed.